STATE OF MICHIGAN

COURT OF APPEALS

COMERICA BANK,

Plaintiff-Appellee,

v

STUART GORELICK,

Defendant-Appellant.

UNPUBLISHED
January 24, 2006

No. 256773
Oakland Circuit Court
LC No. 2003-054748-CK

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10), and entering a judgment in the amount of $180,609.35 in plaintiff's favor as a result of its action to recover on a guaranty agreement executed by defendant, who used the guaranty to receive a $350,000 loan to start the New Faces Skin Care Center (New Faces). We affirm the trial court's judgment in favor of plaintiff.

In 1999, plaintiff loaned defendant $350,000 to fund New Faces corporation under a master revolving note. Defendant executed a guaranty agreement which provided that defendant "unconditionally and absolutely guaranteed" payment on the loan up to $250,000 in principal, plus all interest, costs of collection and attorney fees. After losing his remaining shares of New Faces in a separate court action, defendant sent plaintiff a letter purporting to terminate his guaranty of future indebtedness pursuant to paragraph 6 of the guarantee. Paragraph 6 permitted defendant to terminate his guaranty of future indebtedness. However, paragraph 6 did not permit defendant to terminate his guaranty of any indebtedness that existed at the effective date of his termination of future indebtedness.

After defendant defaulted on its loan and failed to pay the remainder due under the guaranty, plaintiff filed a complaint against defendant for breach of the guaranty. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it was entitled to summary disposition because there was no genuine issue of material fact because the guaranty was unambiguous and required defendant to pay the amount still owed to plaintiff. The trial court granted plaintiff's motion, stating in pertinent part:

> The unambiguous guarantee provides in Paragraph 6 that the guarantor may terminate his obligation as to future indebtedness by delivering written notice. It also states, and I quote, "Any termination shall not affect in any way the

> unconditional obligations of the terminating guarantors as to any indebtedness existing at the effective date of termination . . . ."
>
> Now, Plaintiff has provided an affidavit stating that the indebtedness of $175,830.78 has not been satisfied as of the date of this motion . . . .
>
> Now, although Defendant does not refute this evidence, they argue that the motion is premature because discovery is ongoing . . . .

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Giving the benefit of doubt to the non-movant, this Court must determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995). In reviewing a motion for summary disposition, the trial court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Abbott v John E Green Co*, 233 Mich App 194, 197; 592 NW2d 96 (1998). However, the opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence**,** set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The trial court's decision is reviewed "by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). When the party opposing the motion fails to present evidence to establish a material fact issue, summary disposition is appropriate. *Porter v Royal Oak*, 214 Mich App 478, 484-485; 542 NW2d 905 (1995).

As noted above, while paragraph 6 of the guaranty permits defendant to terminate the guaranty "as to future indebtedness," it also states that the termination does "not affect in any way the unconditional obligations of the terminating guarantor(s) as to any Indebtedness existing at the effective date of termination . . . *this Guaranty shall continue effective until the same shall have been fully paid*." (Emphasis added). Plaintiff supported its motion for summary disposition with the affidavit of Vladimir R. Slapak, an employee of plaintiff, who stated that the remaining amount owed by defendant on the guarantee was $175,870.38, plus interest. Slapak also asserted in the affidavit that no advances were made to New Faces after defendant terminated the guaranty.

By contrast, defendant presented no documentary evidence to oppose or contradict the evidence presented by plaintiff in support of its motion. Defendant merely argues that more discovery (or an evidentiary hearing) is necessary to make certain that no more advances were made to New Faces after defendant terminated his guaranty.

We find that defendant's mere allegations that further discovery will demonstrate that his indebtedness under the guaranty may not be $175,830.78 does not satisfy the standard for establishing a genuine issue of material fact once the moving party has demonstrated its position with documentary evidence. *Abbott, supra* at 198. It is true that "[g]enerally, a motion for

summary disposition is premature if granted before discovery on a disputed issue is complete." *Stringwell v Ann Arbor Pub School Dist*, 262 Mich App 709, 714; 686 NW2d 825 (2004), quoting *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). With only bare assertions that further discovery *might* show that advances were made by plaintiff to New Faces after defendant terminated his guaranty, summary disposition was appropriate here.

Defendant next argues that plaintiff did not exercise due diligence on the guaranty by seeking payment from New Faces, even after defendant's attorney had written plaintiff a letter explaining that defendant no longer owned stock in New Faces and that the business was completely under another stock holder's control. In support of his argument, defendant relies primarily on *Piasecki v Fidelity Corp of Michigan*, 339 Mich 328, 337-338; 63 NW2d 671 (1954), where the principal dispute between the parties was the law governing the duty of a guarantee.

Although our Supreme Court in *Piasecki* held that a duty of a payee to conserve an asset may arise when that payee is in possession of the asset, it also specifically stated that a payee is not under any duty to seek collection from the borrower. *Id.* In fact, one of the cases cited in *Piasecki* is contrary to defendant's position and stands for the proposition that "[m]ere passiveness on the part of the holder will not release the guarantor, even if the maker of the note was solvent at its maturity, and thereafter became insolvent." *Palmer v Schrage*, 258 Mich 560, 571; 242 NW 751 (1932). Therefore, we reject defendant's claim that he should be released from his obligation to pay under the guaranty because plaintiff was passive and failed to exercise due diligence in collecting on the note. Any alleged inaction on the part of plaintiff does not operate as a release of defendant's obligation to repay the debt. *Id.* Moreover, defendant fails to point to anything in the record indicating that he suffered a loss or damage from the plaintiff's inaction that otherwise could have been avoided. In other words, defendant argues that had plaintiff gone after New Faces for the money, he would not be in a position of liability pursuant to the guaranty. What this argument lacks in evidence is eclipsed only by what it lacks in substance. Once defendant signed the guaranty, his liability attached and, absent any semblance of a factual development to the contrary, he remained liable pursuant to the express terms of the guaranty up until the time plaintiff demanded payment.

Defendant next argues that plaintiff's actions on the guaranty violated certain sections of Michigan's version of the UCC. However, he provides no case law, argument or facts demonstrating how those sections support his position. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). We find that defendant has abandoned this issue with a one sentence cursory treatment of the issue in his brief. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Finally, defendant argues the entire waiver contained in paragraph 8 of the guaranty constitutes an adhesion contract because the provisions are unreasonable. Defendant also argues that he was in an unfair bargaining position against plaintiff and that he had no choice but to guarantee the note and accept the waivers stated therein. We disagree.

In determining whether a contract is one of adhesion, this Court considers the relative bargaining power of the parties, their relative economic strength, and the alternative sources of supply. *Sands Appliance Services v Wilson*, 231 Mich App 405, 419; 587 NW2d 814 (1998). "Reasonableness is the primary consideration in deciding whether a contract clause is enforceable." *Id*. "Furthermore, a contract is an adhesion contract only if the party agrees to the contract because he has no meaningful choice to obtain the desired goods or services elsewhere." *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 157 n 28; 596 NW2d 208 (1999).

In this case, defendant has made no showing that a similar guaranty agreement, without such waivers, was unavailable from another company. Instead, defendant argues that plaintiff gave him no choice but to agree to the waivers — not that another company would not provide a similar guaranty without the waivers. Therefore, the trial court correctly stated that "there's no evidence that Defendant had no alternative but to guarantee the note."

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ /Alton T. Davis